

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MAURO BRITO-PACHECO, Deceased; MICHELLE PACHECO, et al.,

Appellants,

v.

**TINA'S HAIR SALON, Respondent; TREASURER OF THE STATE OF MISSOURI -
CUSTODIAN OF THE SECOND INJURY FUND,**

Respondent.

DOCKET NUMBER WD75062

Date: April 30, 2013

Appeal from:
Labor and Industrial Relations Commission

Appellate Judges:
Division Three: Alok Ahuja, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

Attorneys:
Andrew J. Dickson, for Treasurer, State of Missouri, Kansas City, MO, for appellant.
Jerrold Kenter and Paul G. Danaher, Overland Park, for Michelle Pacheco, and Gregory J.
Abella, Kansas City, MO for Respondent Tina's Hair Salon, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Labor and Industrial Relations Commission

Mauro Brito-Pacheco was murdered by a robber on August 10, 2009, while working as a barber at Tina's Hair Salon in Kansas City. Brito-Pacheco's wife filed a claim for workers' compensation benefits. Following a hearing, an administrative law judge within the Division of Workers' Compensation issued a decision finding that, at the time of his death, Brito-Pacheco was not an employee of Tina's Hair Salon either under the common law, or as a "statutory employee" under § 287.040, and that no workers' compensation benefits were therefore owing. Brito-Pacheco's dependents appeal.

AFFIRMED.

Division Three holds:

Appellants do not contest that Brito-Pacheco was an independent contractor. Instead, they argue that he qualified as a statutory employee under § 287.040.1. Based on the terms of his arrangement with the Salon, however, we disagree.

According to the testimony of the Salon's proprietor, her agreement with Brito-Pacheco required him to pay her one-half of any monies he collected from cutting hair at the Salon. Brito-Pacheco was entitled under the arrangement to choose how much or how little he would work, and to decide how much or how little he would charge for his services. He made his own appointments, and maintained his own clientele. He had no obligation to seek permission from, or even inform, the Salon if he did not intend to come in to work, or when he took vacation. Although the Salon provided certain liquid products for the use of all stylists, Brito-Pacheco was responsible for providing his own equipment, including brushes and combs, clippers, and aprons. The Salon provided no training or benefits, and paid no taxes on behalf of its stylists.

When he was cutting hair at the Salon, Brito-Pacheco was doing his own work, not the Salon's. The haircuts Brito-Pacheco performed were not work of the Salon, which Brito-Pacheco had been assigned to perform; instead, Brito-Pacheco had developed his own clientele, and his clients would not permit other stylists to cut their hair when Brito-Pacheco was unavailable. The Salon would not have had to hire other employees to do Brito-Pacheco's work if he was unavailable; in Brito-Pacheco's absence, that work simply would not have existed to be done.

Rather than contracting with Brito-Pacheco to have him perform some portion of the Salon's work, the Salon simply provided him with a facility within which he could ply his trade, in exchange for a share of the revenue he generated. It was up to Brito-Pacheco what use he made of the Salon's facilities, and what income he generated from his use of those facilities.

Prior Missouri cases have recognized that, where an alleged statutory employer merely provides another entity with the facilities in which to engage in revenue-generating activity, the entity providing the facilities is not a statutory employer under § 287.040.1. Under those cases, the Commission correctly determined that Brito-Pacheco was not a statutory employee of the Salon.

Before: Division Three: Alok Ahuja, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

Opinion by: Alok Ahuja, Judge

April 30, 2013

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